May 2003

MJI Publication Updates

Criminal Procedure Monograph 2: Issuance of Search Warrants (Revised Edition)

Criminal Procedure Monograph 5: Preliminary Exams (Revised Edition)

Domestic Violence Benchbook (2d ed)

Juvenile Justice Benchbook (Revised Edition)

Juvenile Traffic Benchbook

Traffic Benchbook – Revised Edition, Vol. 1

Traffic Benchbook – Revised Edition, Vol. 2

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Update: Domestic Violence Benchbook (2d ed)

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.12 Evidence of Other Crimes, Wrongs, or Acts Under MRE 404(b)

C. Other Acts Evidence in Family Violence Cases

Insert the following case summary in Section 5.12(C) at the top of p 193 before the *Watson* case:

F *People v Knox*, ___ Mich App ___ (2003):

The defendant was convicted by a jury of second-degree murder and first-degree child abuse in the death of his four-month old son. The prosecutor argued that the victim sustained the injuries that led to his death while in the defendant's care. The defendant argued that the victim sustained the injuries while in the victim's mother's care. At trial, during the case-in-chief, the prosecutor introduced evidence of "other acts" of the victim's mother, including evidence of her assets as a mother, her love for her children and her knowledge of child rearing. The defendant did not object to the admission of this evidence. On appeal, the defendant objected to the evidence as improper character evidence. The Court of Appeals held:

> "[T]he rules of evidence do not provide that the prosecution may preempt a defense that someone other than defendant committed the crime by arguing that the person the defense blames was 'too good' to have committed the crime. Additionally, the evidence of [the victim's mother's] good character was improper under MRE 404(b) because it did not serve one of the noncharacter purposes articulated in that rule. This evidence was used to demonstrate that [the victim's mother] acted in conformity with her good character on the night of the incident, in contrast to [the defendant's] alleged bad character, and thus that [defendant's] defense should not be believed. Therefore, we conclude, even in light of *Hine*, that [the

> defendant] has demonstrated that it was plain error for the trial court to admit the evidence that [the victim's mother] was a good, loving parent who could not have committed the crime." *Knox, supra* at ___.

Although admission of the evidence was plain error, the Court determined that the error in admitting this evidence did not affect the outcome of the trial and defendant was not entitled to relief. *Id.* at ___.

May 2003

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 17

Designated Case Proceedings—Arraignments, Designation Hearings, and Preliminary Examinations

17.1 Definition of Designated Case Proceeding

A. Prosecutor-Designated Cases

Add the following language after the second paragraph on p 395:

MCL 712A.2d does not violate due process. In *People v Abraham*, ___ Mich App ___, ___ (2003), the Court of Appeals held that MCL 712A.2d does not violate due process. In *Abraham*, an 11-year-old juvenile, who was tried as an adult in the Family Division of the Circuit Court, appealed his conviction and juvenile disposition for second-degree murder. The juvenile was committed to FIA until age 21.

The juvenile first argued that MCL 712A.2d violates due process protections because it permits a prosecuting attorney to criminally charge a juvenile without a prior hearing. *Abraham, supra* at ___. The Court of Appeals disagreed with the juvenile's contention. The Court emphasized that juveniles accused of criminal offenses are not constitutionally entitled to more procedural protections than adults receive in criminal courts. *Abraham, supra* at ___, citing *People v Conat*, 238 Mich App 134, 158 (2000). The Court concluded that the juvenile received all due process protections to which an adult criminal defendant is entitled:

> "Defendant was tried in an ordinary criminal trial in a family court and received all due process protections to which any defendant is entitled: notice of the charges against him by way of an indictment; a preliminary examination hearing determining

> whether the evidence was sufficient for bindover; initial counsel provided by the state . . . ; and a fair, albeit imperfect trial. . . ." *Abraham, supra* at ___.

The defendant next argued that MCL 712A.2d is unconstitutional because it fails to specify a minimum age under which a juvenile may *not* be charged and tried as an adult. The Court of Appeals held:

> "In addition to the reasons stated above for sustaining the statute at issue, we reiterate that the wisdom or humanity of MCL 712A.2d is not within the authority of this Court to determine where children have no constitutional right to juvenile prosecution in this state. See [*People v Conat,* 238 Mich App 134 (2000); *People v Kirby*, 440 Mich 485 (1992)]. It is properly within the prosecutor's discretion to determine whether the state can prove the criminal intent of a child at any particular age." *Abraham, supra* at ___.

The Court of Appeals also dismissed defendant's argument that MCL 712A.2d provided the prosecutor with unfettered charging discretion. The Court indicated that defendant's argument ignored the interaction between the three branches of government in determining what punishment is given to a criminal offender: the Legislature defines the sentences, the court imposes individual sentences and the prosecutor brings charges against defendants that affect which sentences are available for the court to impose. *Abraham, supra* at ___.

CHAPTER 25

Recordkeeping & Reporting Requirements

25.18 Recordkeeping Requirements of the Sex Offenders Registration Act

L. Pertinent Case Law Challenging Registration Act

Add the following language at the end of the first paragraph of Section 25.18(L) on p 539:

> **Retroactive application permissible**. In a case of first impression, the United States Supreme Court held that the registration and notification requirements in a state's "Megan's Law" do not constitute punishment and thus may be applied retroactively under the Ex Post Facto Clause.
>
> In *Smith v Doe*, ___ US ___ (2003), two convicted sex offenders brought suit seeking to declare Alaska's Sex Offender Registration Act void under the Ex Post Facto Clause. The respondent sex offenders, whose convictions were entered before the passage of the Act, claimed that the Act's registration and notification requirements, which applied to them under the terms of the Act, constituted retroactive punishment in violation of the *Ex Post Facto Clause*. In reversing the Court of Appeals, the Supreme Court found that the Act is nonpunitive, thus making retroactive application permissible and not violative of the Ex Post Facto Clause. In coming to this conclusion, the Supreme Court found that the intent of the Alaska Legislature in promulgating the Act "was to create a civil, nonpunitive regime," whose primary purpose was to "protect[] the public from sex offenders." *Id*. at ___, ___.
>
> In addition to finding that the Alaskan Legislature's intent in promulgating the Act was nonpunitive, the Court also found that the purpose and effect of the Act's statutory scheme is not so punitive as to negate the state's intention to deem it civil. In so holding, the Court determined that the Act (1) has not been regarded in history and tradition as punishment; (2) does not impose an affirmative disability or restraint; (3) does not promote the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; and (5) is not excessive with respect to that purpose.

Add the following language to p 539 before the last paragraph, which begins "**Due process under Michigan Constitution"**:

Due process under U.S. Constitution. The United States Supreme Court has held that due process does not require a state to provide a hearing to determine "current dangerousness" before it publicly discloses a convicted sex offender's name, address, photograph, and description on its sex offender registry.

In *Connecticut Department of Public Safety v Doe*, ___ US ___ (2003), the respondent, a convicted sex offender, brought suit against the Connecticut Department of Public Safety on behalf of himself and other sex offender registrants, claiming that the public disclosure of names, addresses, photographs, and descriptions on Connecticut's sex offender registry violates procedural due process under the Fourteenth Amendment. Respondent specifically argued that he and the other registrants were deprived of a liberty interest—reputation combined with status alteration under state law—without first being afforded a predeprivation hearing to determine "current dangerousness." In reversing the judgments of the Court of Appeals and district court, which held that due process requires such a hearing, the Supreme Court began its analysis by first noting that under *Paul v Davis*, 424 US 693 (1976), "mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." *Connecticut Department of Public Safety v Doe, supra at* ___. But the Court found it unneccessary to even address this specific question, because "due process does not entitle [respondent] to a hearing to establish a fact that is not material under the Connecticut statute." *Id*. at ___. The Supreme Court stated that the fact at issue here, i.e., "current dangerousness," is of no consequence under Connecticut's sex offender registry because Connecticut requires registration "solely by virtue of [the individual's] conviction record and state law." Moreover, the Connecticut registry even provides a disclaimer on its website that a registrant's alleged nondangerousness does not matter. Thus, the Supreme Court concluded as follows:

> "In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed. Unless respondent can show that that *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise. . . .
>
> "Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme. Respondent cannot make that showing here." [Emphases in original.] *Id*. at ___.

The Supreme Court decided this case only on procedural, not substantive, due process grounds, stating that "[because] respondent "expressly disavow[ed] any reliance on the substantive component of the Fourteenth Amendment's protections, . . . we express no opinion on whether Connecticut's Megan's Law violates substantive due process. *Id*. at ___.

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Update: Juvenile Traffic Benchbook

CHAPTER 9

Elements of Selected Criminal Traffic Offenses

9.13 "Zero Tolerance" Violations–§625(6)

D. Issues

Insert the following text at the beginning of Section 9.13(D) on page 9-35:

In *People v Haynes*, ___ Mich App ___, ___ (2003), the Court of Appeals upheld the use of a prior uncounselled juvenile adjudication for a "zero tolerance" violation for the purposes of enhancement. The Court held that "a trial court may consider prior juvenile delinquency adjudications obtained without the benefit of counsel in determining a defendant's sentence where the prior adjudication did not result in imprisonment." *Id.* at ___. The Court reaffirmed existing case law permitting use of prior uncounselled misdemeanor convictions for enhancement where counsel was not required for the prior offenses or where the prior adjudications did not result in imprisonment. *People v Reichenbach,* 459 Mich 109 (1998)*; People v Daoust,* 228 Mich App 1, 17–19 (1998).

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Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

Part A — Commentary

2.15 Issuance of Search Warrant in OUIL Cases

Insert the following language on page 31, in the middle of the page after the paragraph beginning with "3. Determine that a licensed physician, . . .":

In *People v Callon*, ___ Mich App ___, ___ (2003), the Michigan Court of Appeals held that MCL 257.625a(6)(c) does not govern the admissibility of blood test results that are not obtained by consent to chemical testing. The admissibility of results obtained through a search warrant as required by MCL 257.625d(1) is governed by the rules of evidence and any relevant constitutional considerations.

May 2003

Update: Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

5.5 Scope of Preliminary Examinations

A. Probable Cause Standard

Add the following language at the end of Section 5.5(A) on page 8:

In *People v Yost*, ___ Mich ___, ___ (2003), the Supreme Court emphasized that existing case law requires a magistrate to pass judgment on the credibility of the witnesses when determining whether a crime has been committed. The Court further indicated that a magistrate has the same duty and responsibility with regard to both lay and expert witnesses. *Id.* at ___.

The Court in *Yost* also addressed the "gap" between probable cause and reasonable doubt:

> "The fact that the magistrate may have had reasonable doubt that defendant committed the crime was not a sufficient basis for refusing to bind defendant over for trial. As we indicated in [*People v Justice (After Remand),* 454 Mich 334, 344 (1997)], a magistrate may legitimately find probable cause while personally entertaining some reservations regarding guilt." *Yost, supra* at ___.

5.22 Closure of Preliminary Examinations to Members of the Public

Replace the second to last paragraph on page 34 with the following language:

Effective May 1, 2003, Administrative Order 2001-38 amends MCR 8.116(D). MCR 8.116(D) now provides:

> "(1) Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless
>
> > (a) a party has filed a written motion that identifies the specific interest to be protected, or the court *sua sponte* has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;
> >
> > (b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
> >
> > (c) the court states on the record the specific reasons for the decision to limit access to the proceeding.
>
> "(2) Any person may file a motion to set aside an order that limits access to a court proceeding under this rule, or an objection to entry of such an order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies the motion or objection, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action.
>
> "(3) Whenever the court enters an order limiting access to a proceeding that otherwise would be public, the court must forward a copy of the order to the State Court Administrative Office."

5.43 Circuit Court Review of Errors at Preliminary Examinations

B. Prosecutor's Appeal to Circuit Court

Add the following language at the end of Section B on page 56:

In *People v Yost*, ___ Mich ___, ___ (2003) the Supreme Court reviewed case law regarding the standard for reversing a magistrate's bindover decision. The Court provided:

> "Our case law has sometimes indicated that a reviewing court may not reverse a magistrate's bindover decision absent a 'clear abuse of discretion,' e.g., *People v Dellabonda*, 265 Mich 486, 491; 251 NW 594 (1933); *[People v Doss,* 406 Mich 90, 101(1979)]. At other times our case law has omitted the word 'clear' and has simply required a reviewing court find an 'abuse of discretion,' e.g., *Genesee Prosecutor v Genesee Circuit Judge,* 391 Mich 115, 121; 215 NW2d 145 (1974); [*People v Justice (After Remand)*, 454 Mich 334, 344 (1997)]."

In *Yost*, after a seven-day preliminary exam, the magistrate refused to bind the defendant over for trial on first-degree murder. The magistrate indicated that credible evidence of a homicide was lacking. *Yost, supra* at ___. The prosecutor appealed the magistrate's decision to the circuit court. The circuit court concluded that the record established a sufficient basis for finding that a homicide was committed and probable cause to believe the defendant committed it. The circuit court held that the magistrate had abused his discretion in refusing to bind defendant over. *Id*. at ___. On leave granted, the Supreme Court upheld the circuit court's decision and stated:

> "[W]e agree with the circuit court that the expert testimony in tandem with the circumstantial evidence, which included evidence relating to motive and opportunity, was sufficient to warrant a bindover. . . . [T]he magistrate abused his discretion when he concluded from all the evidence that probable cause to bind defendant over for trial did not exist. . . . The fact that the magistrate may have had reasonable doubt that defendant committed the crime was not a sufficient basis for refusing to bind defendant over for trial. As we stated in *[People v Justice* (*After Remand*), 454 Mich 334, 344 (1997)], a magistrate may legitimately find probable cause while personally entertaining some reservations regarding guilt." *Yost, supra* at ___.

May 2003

Update: Traffic Benchbook – Revised Edition, Volume 1

CHAPTER 5

Snowmobiles

5.13 Operation of Snowmobiles in Places Where Snowmobiles Are Prohibited

Effective April 22, 2003, 2003 PA 2 amended MCL 324.82126. Please replace the paragraph at the bottom of page 5-13 and all of the language on page 5-14 with the following language:

MCL 324.82126(1) provides that a snowmobile may not be operated under the following circumstances:

"(c) On the frozen surface of public waters as follows:

(i) Within 100 feet of a person, including a skater, who is not in or upon a snowmobile.

(ii) Within 100 feet of a fishing shanty or shelter except at the minimum speed required to maintain forward movement of the snowmobile.

(iii) On an area that has been cleared of snow for skating purposes unless the area is necessary for access to the public water.

* * *

"(e) Within 100 feet of a dwelling between 12 midnight and 6 a.m., at a speed greater than the minimum required to maintain forward movement of the snowmobile.

"(f) In an area on which public hunting is permitted during the regular November firearm deer season from 7 a.m. to 11 a.m. and from 2 p.m. to 5 p.m., except under 1 or more of the following circumstances:

(i) During an emergency.

(ii) For law enforcement purposes.

(iii) To go to and from a permanent residence or a hunting camp otherwise inaccessible by a conventional wheeled vehicle.

(iv) For the conduct of necessary work functions involving land and timber survey, communication and transmission line patrol, and timber harvest operations.

(v) On the person's own property or property under the person's control or as an invited guest.

* * *

"(i) Within 100 feet of a slide, ski, or skating area except when traveling on a county road right-of-way pursuant to section 82119 or a snowmobile trail that is designated and funded by the department. A snowmobile may enter such an area for the purpose of servicing the area or for medical emergencies.

"(j) On a railroad or railroad right-of-way. This prohibition does not apply to railroad personnel, public utility personnel, law enforcement personnel while in the performance of their duties, and persons using a snowmobile trail located on or along a railroad right-of-way, or an at-grade snowmobile trail crossing of a railroad right-of-way, that has been expressly approved in writing by the owner of the right-of-way and each railroad company using the tracks and that meets the conditions imposed in subsections (2) and (3). A snowmobile trail or an at-grade snowmobile trail crossing shall not be constructed on a right-of-way designated by the federal government as a high-speed rail corridor."

A violation of any of these provisions is a misdemeanor. See MCL 324.82133.

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Update: Traffic Benchbook – Revised Edition, Volume 2

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.6 Arraignment/Pretrial Procedures

E. Guilty and Nolo Contendere Pleas

2. Use of Uncounselled Conviction to Enhance Subsequent Charge or Sentence

Insert the following text at the end of Section 2.6(E)(2) on page 2-36:

In *People v Haynes*, ___ Mich App ___, ___ (2003), the Court of Appeals upheld the use of a prior uncounselled juvenile adjudication for a "zero tolerance" violation for the purposes of enhancement. The Court held that "a trial court may consider prior juvenile delinquency adjudications obtained without the benefit of counsel in determining a defendant's sentence where the prior adjudication did not result in imprisonment." *Id.* at ___. The Court reaffirmed existing case law permitting use of prior uncounselled misdemeanor convictions for enhancement where counsel was not required for the prior offenses or where the prior adjudications did not result in imprisonment. *People v Reichenbach,* 459 Mich 109 (1998)*; People v Daoust,* 228 Mich App 1, 17–19 (1998).

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.9 General Sentencing Considerations for §625 and §904 Offenses

B. Establishing Prior Convictions

Insert the following text at the end of Section 2.9(B) on page 2-49:

In *People v Callon*, ___ Mich App ___, ___ (2003), the Michigan Court of Appeals upheld the use of a "prior conviction" to enhance a conviction of OUIL/UBAL to a felony. The defendant was convicted of OUIL as a third offender. The defendant claimed that use of his "prior conviction" operated as an ex post facto law because the prior OWI occurred before the effective date of the amendment adding OWI to the list of offenses in the enhancement statute. The Court held that the enhancement statute did not act as an ex post facto law because it did not attach legal consequences to defendant's prior OWI conviction but rather attached legal consequences to the defendant's future conduct of committing an OUIL. *Id.* at ___.

In *People v Haynes*, ___ Mich App ___, ___ (2003), the Court of Appeals upheld the use of a prior uncounselled juvenile adjudication for a "zero tolerance" violation for the purposes of enhancement. The Court held that "a trial court may consider prior juvenile delinquency adjudications obtained without the benefit of counsel in determining a defendant's sentence where the prior adjudication did not result in imprisonment." *Id.* at ___. The Court reaffirmed existing case law permitting use of prior uncounselled misdemeanor convictions for enhancement where counsel was not required for the prior offenses or where the prior adjudications did not result in imprisonment. *People v Reichenbach,* 459 Mich 109 (1998)*; People v Daoust,* 228 Mich App 1, 17–19 (1998).

CHAPTER 3

Section 625 Offenses

3.1 OUIL/OUID/UBAC – §625(1)

C. Criminal Penalties and Other Sanctions for Violations of §625(1)

3. Offenders Who Violate §625(1) Within Ten Years of Two or More Prior Convictions

Insert the following text at the end of Section 3.1(C)(3) on page 3-7:

In *People v Callon*, ___ Mich App ___, ___ (2003), the Michigan Court of Appeals upheld the use of a "prior conviction" to enhance a conviction of OUIL/UBAL to a felony. The defendant was convicted of OUIL as a third offender. The defendant claimed that use of his "prior conviction" operated as an ex post facto law because the prior OWI occurred before the effective date of the amendment adding OWI to the list of offenses in the enhancement statute. The Court held that the enhancement statute did not act as an ex post facto law because it did not attach legal consequences to defendant's prior OWI conviction but rather attached legal consequences to the defendant's future conduct of committing an OUIL. *Id*. at ___.